No. 90-1713

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In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES OF AMERICA, PETITIONER

v.

ALEJANDRO GARCIA IBARRA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether the time to file an appeal of a suppression order runs from the denial of a timely filed motion to reconsider that order, even when the motion to reconsider is based on a previously conceded theory of admissibility.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 920 F.2d 702. The district court opinions (App., *infra*, 19a-50a) are reported at 731 F. Supp. 1037 and 725 F. Supp. 1195.

JURISDICTION

The judgment of the court of appeals was entered on December 3, 1990. A petition for rehearing was denied on February 12, 1991 (App., *infra*, 51a-52a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND RULE INVOLVED

1. 18 U.S.C. 3731 provides in pertinent part:

> An appeal by the United States shall lie to a court of appeals from a decision or order of a district court[] suppressing or excluding evidence * * *.
>
> * * * * *
>
> The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.
>
> The provisions of this section shall be liberally construed to effectuate its purposes.

2. Federal Rule of Appellate Procedure 4(b) provides in pertinent part:

> When an appeal by the government is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of (i) the judgment or order appealed from or (ii) a notice of appeal by any defendant. A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket.

STATEMENT

1. On March 24, 1989, Wyoming Highway Patrolman Scott Mahaffey saw a car with California tags weaving along an interstate highway. He stopped the car to determine whether the driver was intoxicated. Respondent, who was driving, did not appear to be intoxicated, but Officer Mahaffey discovered that respondent was driving with a suspended license. The license of his passenger, Maria Linares, was also suspended. Respondent produced a California registration certificate for the car in the name of

Charles Joseph Petrocchi, explaining that he had purchased the car from Petrocchi two days earlier; he could not produce a bill of sale, however, and the ownership transfer portion of the registration certificate was not filled in. App., *infra*, 29a-30a; Tr. 6, 9-12, 15, 20, 37, 99.[1]

Mahaffey gave respondent a ticket for operating a motor vehicle with a suspended license, which required respondent to post a $220 appearance bond. After giving Mahaffey $220 for the bond, respondent stated that he had only about $40 left with which to reach Chicago. App., *infra*, 30a-31a; Tr. 18-21, 24, 71. In further discussion about his destination, respondent gave inconsistent answers to Mahaffey's questions and finally asserted that he was moving to Chicago, although he appeared to be "traveling 'light' " (App., *infra*, 31a).

At that point, Mahaffey's suspicions were aroused, and he asked respondent whether the car contained weapons, large amounts of money, or controlled substances. When respondent said no, Mahaffey requested and received permission to search the car, and respondent unlocked the trunk. While Mahaffey searched the passenger compartment, Patrolman Gregory Leazenby (who had arrived on the scene while Mahaffey was questioning respondent) searched the trunk. Respondent's car and the patrol cars were parked on a narrow shoulder at a sharp curve in the highway where there had been several accidents; another accident had nearly occurred during the officers' investigation. Because of his concerns about safety, Mahaffey conducted only a brief search by

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[1] "Tr." refers to the transcript of the hearing on the motion to suppress held on Sept. 12, 1989.

the highway. App., *infra*, 31a; Tr. 20-23, 88-89; 91-92, 107.

In light of all the circumstances, Mahaffey decided to impound the car, and he arranged for a private towing service to tow it into Laramie, a short distance away. App., *infra*, 31a-32a; Tr. 23-27, 93-94, 107-109. As the officers drove respondent and Linares to the Western Union office in Laramie so that they could wire for more money and arrange for someone to drive the car, Mahaffey reached Petrocchi's wife on his radio, and she informed him that her husband had sold the vehicle to respondent two weeks earlier. Mahaffey also learned that respondent had no liability insurance for the vehicle, although liability insurance is required for driving in Wyoming. App., *infra*, 32a; Tr. 27-28, 102-103.

The officers left respondent and Linares at the Western Union office and went to the towing service lot. En route, Leazenby told Mahaffey that he had seen "a small plastic bag or something" protruding from underneath the spare tire in the trunk. Tr. 90. At the towing service lot, Mahaffey started an inventory of the car's contents by removing all the items from the trunk. Mahaffey later testified that he believed he "was operating under a continuance of consent." Tr. 28-29, 105-106. As Mahaffey was emptying the trunk, he noticed a plastic bag behind the spare tire. He removed the tire and found a large package wrapped with duct tape. Through a cut in the tape he saw a white powdery substance, which turned out to be cocaine. App., *infra*, 32a; Tr. 29-31.

Mahaffey ceased his search of the vehicle, notified the Drug Enforcement Administration (DEA) and the Wyoming Division of Criminal Investigation (DCI) of his discovery, and relinquished custody of the vehicle to officials of those agencies. Leazenby

returned to the Western Union office and arrested respondent and Linares. After being advised of his *Miranda* rights, respondent admitted to a DCI agent that he was transporting cocaine to Chicago. App., *infra*, 32a; Tr. 30, 61, 99, 112-113.

2. Respondent was indicted by a federal grand jury for possession of cocaine with the intent to distribute it. He filed a pretrial motion to suppress all the evidence seized during the search as well as his statement to the DCI agent, asserting that the stop of his vehicle was pretextual; that his consent to the search was involuntary and was, in any event, withdrawn prior to the second search; and that the second search was not made pursuant to a lawful inventory procedure. In opposition to the motion, the government defended the legality of the stop and the impoundment, and argued that the cocaine would inevitably have been discovered once Mahaffey conducted his planned inventory search. App., *infra*, 33a, 44a-45a. The government originally asserted that the search of the car at the towing service lot was made pursuant to respondent's continuing consent, but it later abandoned that argument, stating that "additional search has failed to provide legal support for this position, and the argument is conceded." App., *infra*, 21a.

After an evidentiary hearing, the district court granted respondent's motion to suppress on November 15, 1989. App., *infra*, 29a-50a. The court found that the initial stop was lawful, but that an inventory search was not reasonable, because there was insufficient justification for taking custody of the car.[2] App., *infra*, 37a, 43a, 49a.

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[2] The district court noted the government's concession that the second search could not be justified under a continuing consent theory. App., *infra*, 37a.

The Assistant United States Attorney handling the case reported the adverse decision to the Criminal Division of the Department of Justice. At the direction of the Criminal Division, the Assistant United States Attorney on December 13, 1989, moved for reconsideration of the suppression order, reasserting the continuing consent rationale. On January 3, 1990, the district court denied reconsideration after considering the argument on the merits. App., *infra*, 19a-28a. On January 30, 1990, the government filed a notice of appeal. App., *infra*, 5a.

3. The court of appeals, by a divided vote, dismissed the appeal on the ground that it lacked jurisdiction to review the district court's order. App., *infra*, 1a-18a. The court held that the 30-day statutory time period in which to take an appeal ran from the date of the initial order suppressing the evidence, not from the date of the denial of reconsideration of that motion, because the government's motion sought only to raise a previously conceded issue.[3] For that reason, the court held that the government's notice of appeal was jurisdictionally out of time. App. *infra*, 11a.

The court of appeals distinguished *United States* v. *Dieter*, 429 U.S. 6 (1976), in which this Court held that the government has 30 days from the district court's denial of a timely filed motion for reconsideration to appeal an order suppressing evidence or dismissing an indictment. The court noted that

[3] Although the court of appeals repeatedly referred to the question at issue here as involving the "tolling" of the appeal time, there is no suggestion that traditional tolling is involved. Instead, the question is whether the district court's denial of the reconsideration motion is the final appealable order that starts the time for appeal of the decision on the merits. For convenience, we will follow the court of appeals' practice in referring to this as a question of tolling.

the motion in this case, unlike the motion in *Dieter*, involved an attempt to raise a previously conceded issue. The court found that distinction significant because, it said, a concession is generally binding on the party that makes it, and because the court had previously indicated (in *United States* v. *Smith*, 781 F.2d 184 (10th Cir. 1986)), its disapproval of government efforts to raise previously conceded issues. Accordingly, the court concluded, a motion raising such an issue has very little likelihood of success and is more likely to prolong the litigation process, thereby "subvert[ing], rather than further[ing], the concern for judicial economy." App., *infra*, 9a. For that reason, the court found that the government's motion attempting to withdraw a concession should be equated with a successive motion for reconsideration, which does not toll the appeal time. App., *infra*, 6a-9a.

The court of appeals also concluded that *Dieter* was not controlling because the government's motion did not ask the district court to correct an error of law in its original opinion or to consider an argument previously made that it had not addressed, "[n]or did the government in its motion cite contrary authority announced after it conceded the continuing consent issue, sparing the parties and the appellate court the burden of unnecessary appellate proceedings." App., *infra*, 9a-10a. The court accordingly concluded that the government's motion did not toll the time for taking an appeal, because it did not "ask 'the District Court to reconsider [a] question decided in the case' in order to effect an 'alteration of the rights adjudicated.'" App., *infra*, 10a, quoting *United States* v. *Dieter*, 429 U.S. at 9.

Judge Baldock dissented. He found the court's holding to be "plainly contrary to *United States* v. *Dieter*." App., *infra*, 12a. In his view, *Dieter* di-

rects that "we do not conduct a merits review of every motion for reconsideration to insure that it meets the salutary purposes of the rule which provides for tolling the time in which to take an appeal." *Ibid.*

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals creates uncertainty in an area where it is essential to have a bright-line rule capable of easy application. As a result, the decision, which conflicts with the reasoning of another court of appeals, is likely to impair the efficient administration of criminal proceedings in the federal system and the effective management of the government's criminal litigation.

1. In civil cases, Fed. R. App. P. 4(a) specifically provides that the time for filing a notice of appeal runs from the entry of an order denying a motion for reconsideration. The provision dealing with criminal appeals, Fed. R. App. P. 4(b), contains no similar language; nevertheless, *United States* v. *Dieter*, 429 U.S. 6 (1976), requires the same result in criminal cases. See R. Stern, *Appellate Practice in the United States* 96 (1981). The decision of the court of appeals blurs this heretofore clear jurisdictional rule, creating uncertainty about the circumstances under which a reconsideration motion will toll the appeal time. Because it requires a party considering whether to file a motion for reconsideration to guess about the time within which he must file an appeal if his motion is unsuccessful—or simply not promptly decided—it will deter the filing of such motions.

The Federal Rules of Criminal Procedure should be applied to encourage the correct resolution of cases at the district court level without the expenditure of appellate resources. If a district court is willing to reconsider an unwarranted initial determination on

the basis of a reconsideration motion, even one that retracts an ill-considered concession, the system of justice benefits by getting the case decided correctly at the trial level, and perhaps avoiding an appeal.[4] The system benefits even when the motion does not avoid an appeal. Whether the court grants the reconsideration motion, considers the new matter on the merits before denying it, or denies the motion on the ground that the prior concession should be binding under the circumstances, the court of appeals will be able to resolve the case based on a fully developed legal and factual record.

2. The court of appeals took a narrow view of what constitutes a "proper motion for reconsideration," and thus created a broad and ill-defined exception to the principle that the time for filing a notice of appeal does not start to run until the denial of a timely motion for reconsideration. A "proper" motion for reconsideration, the court held, is one that "ask[s] the court to reconsider a [previously raised] point of law or fact that it misapprehended or overlooked." App., *infra*, 8a n.3; see also *id.* at 11a n.7. Thus, the court's rule would apparently bar motions for reconsideration based on new legal or factual ar-

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[4] Despite the "disfavor" with which the court below views attempts to retract concessions, the general rule is that a party's concession on a point of law is not binding on a court of appeals. See *Government of Virgin Islands* v. *Josiah*, 641 F.2d 1103, 1107 n.1 (3d Cir. 1981); *United States* v. *Smith*, 621 F.2d 483, 489 n.3 (2d Cir. 1980), cert. denied, 449 U.S. 1086 (1981); *United States* v. *Tortorello*, 533 F.2d 809, 812 (2d Cir.), cert. denied, 429 U.S. 894 (1976); *United States* v. *Lisk*, 522 F.2d 228, 231 n.8 (7th Cir. 1975), cert. denied, 423 U.S. 1078 (1976). Since an appellate court is free to consider whether to permit a party to retract a concession, it follows that a district court should also be able to do so in the first instance.

guments raised for the first time in the reconsideration motion. While a court may be free in some circumstances to refuse to consider points previously conceded or new arguments raised for the first time on reconsideration, it is most unwise, we submit, to convert that discretionary decision into a jurisdictional rule. Put another way, the appellate court's jurisdiction should not turn on that court's assessment of whether the appellant was entitled to raise a particular legal or factual issue in its motion for reconsideration in the district court.

As a general matter, principles of finality should be as clear as possible, so that litigants and the courts will have no room for doubt about when an order is final and when the time for filing an appeal begins to run. Murky jurisdictional lines create waste and potential unfairness—wasted time on appellate decisions dealing with the jurisdictional issues, and the forfeiture of potentially meritorious claims when the party pressing those claims guesses wrong about the scope of the jurisdictional rule.

To confine "proper" motions for reconsideration to those simply asking for reconsideration of particular legal and factual matters previously raised by the party, rather than the reconsideration of the order in question, would create a fertile ground for dispute over matters having nothing to do with the merits of the cause. Arguments could be expected to arise over whether a particular issue was raised in the motion for reconsideration for the first time, rather than simply given greater emphasis or a new characterization. Disagreements would surely arise about whether a particular citation or statement in the initial pleading was sufficient to make a particular argument that was expanded upon in the motion for reconsideration. And there would be great doubt about the extent to

which the government could present new factual allegations to the court, which may have become relevant only because of an unexpected legal ground adopted by the court in its initial ruling.

Moreover, when presenting something other than a square restatement of its initial argument, the government would have to gamble that the appellate court would regard the motion for reconsideration as "proper." Even if the district court considered the motion on the merits, as in this case, the government would still run the risk that the appellate court would regard the motion as "improper" and thus treat the appeal as untimely. The uncertainties flowing from such a regime would create pointless distractions in a system already straining to handle its caseload.

3. Motions for reconsideration are an essential part of the federal government's administration of its criminal cases. The government's criminal litigation is monitored by the Criminal Division of the Department of Justice in Washington. Each United States Attorney's Office is required to inform the Division immediately of all district court decisions that are adverse to the government. United States Attorneys' Manual paras. 2-2.110, 9-2.171 (1988). The Division reviews each such decision to ensure that the United States Attorney has presented every argument that is legally and factually supportable, and that the positions advanced are consistent throughout the federal system. It is unavoidable that the various United States Attorney's Offices will sometimes take differing positions on a legal issue. Through the adverse decision reporting process, the Department learns of such inconsistencies. For instance, a United States Attorney's Office may have advanced a posi-

tion that is legally at odds with the Department's position, perhaps by conceding a legal argument that is being pressed in other United States Attorney's Offices, or by failing to make appropriate arguments that are being asserted in similar cases in other offices.

When such lapses are identified, the Division frequently suggests to the United States Attorney that he move for reconsideration in the district court before authorization for an appeal is sought from the Solicitor General. It follows that the government's reconsideration motions sometimes seek to retract inappropriate concessions, and often bring new legal arguments to the attention of the district court.

Uncertainty about the circumstances in which a motion for reconsideration will toll the government's appeal time would greatly complicate the use of the motion for reconsideration as a tool for maintaining the uniformity of criminal litigation policies. Under the requirement established by the decision in this case, the government would have to weigh the risk that a motion for reconsideration would forfeit the government's appeal rights if the appellate court considered it inappropriate.[5]

4. The decision below misinterprets this Court's decision in *United States* v. *Dieter*, *supra*, which adopted the bright line rule rejected by the court below. *Dieter* held that a party's appeal time runs from the denial of a timely filed motion for reconsideration. The Criminal Appeals Act, 18 U.S.C. 3731, provides

[5] If the government did decide to file a reconsideration motion in such circumstances and the district court did not act on the motion within 30 days of its original decision on the merits, the government would be required to protect its appeal rights by filing a notice of appeal, thereby presumably removing the case from the district court's jurisdiction without a ruling on the reconsideration motion.

that an appeal by the United States from a decision or order of a district court suppressing evidence shall be taken within 30 days after the order has been rendered. Accord Fed. R. App. P. 4(b) (government appeal must be filed within 30 days after the entry of the order appealed from). *Dieter* is grounded on the "traditional and virtually unquestioned practice," 429 U.S. at 8 n.3 (quoting *United States* v. *Healy*, 376 U.S. 75, 79 (1964)), that the filing of a motion to reconsider suspends the finality of the court's judgment pending the court's determination whether the judgment should be modified. See, *e.g.*, *Department of Banking* v. *Pink*, 317 U.S. 264, 266 (1942); *Communist Party of Indiana* v. *Whitcomb*, 414 U.S. 441, 445 (1974) ("Appellees' motion for reconsideration * * * suspended the finality of the [district court] judgment * * * until the District Court's denial of the motion * * * restored it."). Cf. R. Stern, E. Gressman and S. Shapiro, *Supreme Court Practice* 312 (6th ed. 1986); Rule 13.4 of the Rules of this Court.[6]

The court of appeals attempted to distinguish *Dieter* on the ground that the government's reconsideration motion in this case was unlike the motion in *Dieter*.[7] The court likened a motion for reconsidera-

[6] In *Bowman* v. *Loperena*, 311 U.S. 262, 266 (1940), the Court held that even an untimely petition for rehearing of a district court order tolled the time for taking an appeal because the district court allowed the petition and considered it on its merits. *A fortiori*, the appeal time should be tolled by a timely filed motion for reconsideration (even one asserting grounds disfavored by the court of appeals), particularly when—as here—the district court has considered it on the merits before denying it. See generally R. Stern, *Appellate Practice in the United States* 96 (1981).

[7] As Judge Baldock observed in dissent, App., *infra*, 12a, *Dieter* itself arose out of a prior unsuccessful attempt by the

tion of a previously conceded issue to a successive motion for reconsideration, which does not affect the running of the appeal time.[8] That analogy is inapt. In this case the government filed only one motion for reconsideration. Even if, as the court observed, concessions are usually binding and their withdrawal disfavored, that does not somehow transform a single motion to reconsider based on a previously conceded theory into an impermissible successive attempt to toll the government's appeal time.[9]

The court of appeals suggested that *Dieter* is inapplicable to the government's motion in this case because the instant motion "did not request that the district court correct an alleged error of law or set aside a ruling on the grounds of mistake or inadvertance." App., *infra*, 9a. The court of appeals con-

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Tenth Circuit to "craft distinctions * * * on the general rule that the government has thirty days from the district court's denial of a timely filed motion for reconsideration to appeal an order granting suppression."

[8] In *United States* v. *Marsh*, 700 F.2d 1322 (10th Cir. 1983), upon which the court below relied, a motion for reconsideration of a trial court's order denying a new trial did not toll the time period in which to file a notice of appeal because the new trial motion was, in essence, a motion for rehearing. The motion for reconsideration, which served an identical function, was therefore successive. As the court explained: "[The defendant] is not entitled to two bites, so to speak. * * * [H]e is not entitled to two motions for rehearing, and that is what, in substance, is sought." 700 F.2d at 1324. Accord *United States* v. *Rothseiden*, 680 F.2d 96, 97 (11th Cir. 1982).

[9] As Judge Baldock noted in his dissent, App., *infra*, 17a, "the government's right to appeal the suppression order * * * should not be abrogated merely because the government exercised its right to file a motion for reconsideration on grounds obviously viewed with disfavor by this court."

cluded, therefore, that the government's motion, unlike the motion at issue in *Dieter*, did not ask the district court to "reconsider [a] question decided in the case" in order to effect an "alteration of the rights adjudicated." App., *infra*, 10a (quoting *Dieter*, 429 U.S. at 9). This cramped view of the appropriate scope of a motion for reconsideration is inconsistent with *Dieter*.

In *Dieter*, the Tenth Circuit had found *Healy* inapplicable because the post-trial motion in *Healy* "was directed squarely at an alleged error of law committed by the trial court," whereas in *Dieter*, the Government's motion to set aside the court's ruling on the ground of mistake or inadvertence "was an entirely different species of pleading." 429 U.S. at 8. This Court reversed, explaining that the considerations that had prompted the rule announced in *Healy* "fully apply whether the issue presented on appeal is termed one of fact or of law," and that nothing in *Healy* supported the distinction drawn by the court of appeals. *Ibid.* The *Dieter* Court concluded: "It is true that the Government's post-dismissal motion was not captioned a 'petition for rehearing,' but there can be no doubt that in purpose and effect it was precisely that, asking the District Court to 'reconsider [a] question decided in the case' in order to effect an 'alteration of the rights adjudicated.'" *Id.* at 8-9 (quoting *Department of Banking* v. *Pink*, 317 U.S. 264, 266 (1942)).

As Judge Baldock explained below, the clear import of *Dieter* is that a court is not to consider the merits of a motion for reconsideration in determining its jurisdictional effect. App., *infra*, 12a. The majority's response (App., *infra*, 7a-8a n.3)—that it was merely looking beyond the caption of the government's motion in order to determine its substance, the

same inquiry that this Court had conducted in *Dieter* and in *Pink*—misapprehends the nature of the Court's inquiry in *Dieter* and *Pink*. The Court in those cases looked beyond the caption of the government's motion solely to determine the nature of the relief sought. Thus, in *Pink*, the motion did not toll the time within which to petition for certiorari because it did not challenge the final judgment of the lower court. 317 U.S. at 266.[10] In contrast, the government's motion in *Dieter*, although not termed a motion for reconsideration, was treated like one because it *did* challenge the district court's judgment—it sought an "alteration of the rights adjudicated." This case is like *Dieter*, not *Pink*. The government's reconsideration motion clearly challenged the district court's ruling—it sought a reversal of the district court's order suppressing evidence. Accordingly, like the motion in *Dieter*, the motion in this case tolled the government's appeal time by depriving the initial order of finality until the district court ruled on the government's motion.

5. Finally, the court of appeals' decision is inconsistent with the decision of the Eleventh Circuit in *United States* v. *Ladson*, 774 F.2d 436, 438-439 n.3 (1985). In *Ladson*, the Eleventh Circuit recognized

[10] The motion at issue in *Pink* simply sought the court's certification that a federal question had been presented to it for decision. In that circumstance, the Court explained (317 U.S. at 266 (emphasis added)):

> A timely petition for rehearing tolls the running of the three-months period because it operates to suspend the finality of the state court's judgment, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties. *Here no such alteration of the rights adjudicated was asked*, and the finality of the court's first order was never suspended.

that *Dieter* teaches that a reconsideration motion asserting a new argument tolls the time for filing an appeal. It rejected the argument that such a motion does not ask the court to "reconsider" anything, correctly observing that the motion seeks reconsideration of the court's "ultimate holding on the suppression issue." 774 F.2d at 438 n.3. The court below recognized, App., *infra*, 10a-11a n.7, that its analysis of the "proper" scope of a motion for reconsideration conflicts with this approach. While the narrow holding of this case—involving a withdrawn concession—does not conflict with the holding in *Ladson*, the analysis in the two cases is squarely at odds.

Because of its substantial practical importance in the day-to-day administration of criminal justice, the issue raised by that conflict warrants resolution by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

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MAY 1991

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 90-8018

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

ALEJANDRO GARCIA IBARRA, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the District of Wyoming
(D.C. No. CR-89-0025-01J)

[Filed Dec. 3, 1990]

Before McKAY and BALDOCK, Circuit Judges, and KANE,[1] District Judge.

McKAY, Circuit Judge.

This appeal arises from an order of the district court suppressing certain evidence. The district court found that a search of the defendant's vehicle by law enforcement officials violated the defendant's rights

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[1] Honorable John L. Kane, Jr., Senior United States District Judge for the District of Colorado, sitting by designation.

under the fourth amendment of the United States Constitution. The United States has appealed. It asserts that the search of the vehicle was pursuant to a valid consent and that, in any event, the evidence should not be excluded under the doctrine of inevitable discovery announced in *Nix v. Williams*, 467 U.S. 431 (1984). The defendant contests the merits of the government's claims. In addition, he questions the jurisdiction of this court to hear the appeal; the defendant argues that the notice of appeal is untimely under Rule 4(b) of the Federal Rules of Appellate Procedure. We hold that the government's appeal of the district court's order was untimely filed and therefore do not reach the merits of the government's claims.

I.

On March 24, 1989, the defendant, Alejandro Garcia Ibarra, was stopped by Wyoming Highway Patrolman Scott Mahaffey while traveling eastward on Interstate 80. The patrolman issued the defendant a warning notice for failing to signal when passing. Patrolman Mahaffey then ran a check on the defendant's license and discovered that it had been suspended. He issued the defendant a citation for operating a motor vehicle with a suspended license.

Along with a second patrolman who arrived on the scene, Patrolman Mahaffey then obtained permission to search defendant's car, including the trunk. The search revealed no incriminating evidence. Without consulting the defendant, the patrolman called a private towing service to tow the defendant's vehicle into a nearby city after discovering that the defendant's sole passenger did not have a valid driver's license. Patrolman Mahaffey informed the defendant that he would need to find a licensed driver before the

vehicle would be released. The patrolmen then transported the defendant and his passenger to a Western Union station.

Afterward, the patrolmen drove to where the defendant's vehicle was impounded and conducted a second search for contraband. They discovered a brick-shaped container wrapped with tape underneath the spare tire in the trunk. A cut in the container revealed a white powdery substance. The defendant was later indicted on one count of possession with intent to distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B)(ii) (1988).

On May 10, 1989, the defendant moved to suppress the evidence obtained in the search of the impounded vehicle as well as a statement he made shortly after his arrest. The defendant argued that the law enforcement officer's stop of his vehicle was pretextual, that his consent to search the vehicle was made under duress, that he withdrew the consent before the second search of the impounded vehicle, and that the second search was not made pursuant to a lawful inventory search. The government responded that the patrolman stopped the defendant for a lawful purpose. In addition, it argued that the second search was conducted pursuant to the defendant's continuous consent. It finally argued that the evidence would have been inevitably discovered once Patrolman Mahaffey conducted a previously planned inventory search.

In response to a memorandum of authority submitted on behalf of the defendant, however, the government rescinded its argument relating to the defendant's continuous consent to the search. The government stated: "Contrary to its prior-stated position, the United States no longer argues that the

second search of the Defendant's vehicle is supportable on the basis of continuing consent. Additional research has failed to provide legal support for this position, and the argument is conceded." United States' Supplemental Memorandum in Support of Proposed Findings of Fact and Conclusions of Law at 1.

On November 15, 1989, after conducting an evidentiary hearing, the district court granted the defendant's motion to suppress. *United States v. Ibarra*, 725 F. Supp. 1195 (D. Wyo. 1989). In its order, the district court noted the government's concession that the second search was not conducted pursuant to a continuing consent. *Id.* at 1199-1200.

On December 13, 1989, the government filed with the district court a motion entitled "Motion for Reconsideration of Suppression Order." The sole basis of the government's request for reconsideration was its previously conceded argument that the second search of the vehicle was valid under a continuing consent theory. On January 3, 1990, the district court denied the motion for reconsideration. *United States v. Ibarra*, 731 F. Supp. 1037 (D. Wyo. 1990). Before addressing the merits of the government's claim, the district court noted that no evidence was presented on this issue at the evidentiary hearing. The court then determined that the government was asking it to decide a new issue for which no record was developed. In a footnote, the district court further stated:

> Whether the motion is in fact one for reconsideration is relevant for purposes of appeal in this case. A motion for reconsideration in a criminal case tolls the 30 days in which the government may file its notice of appeal, provided such a motion is in fact one for reconsideration and filed within the 30-day period.

Id. at 1039 n.2. On January 30, 1990, the government filed a notice of appeal in the district court.

II.

As a threshold matter, the defendant argues that the government's notice of appeal in the district court was untimely. A timely filing of a notice of appeal is required to vest this court with jurisdiction. *United States v. Martinez*, 681 F.2d 1248, 1254 (10th Cir. 1982).

Under Federal Rule of Appellate Procedure 4(b) and 18 U.S.C. § 3731, the government in a criminal case must file a notice of appeal of an order suppressing or excluding evidence within thirty days of the entry of the order.[2] Here, the district court granted the defendant's motion to suppress on November 15,

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[2] Federal Rule of Appellate Procedure 4(b) provides in relevant part:

> When an appeal by the government is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of (i) the judgment or order appealed from or (ii) a notice of appeal by any defendant. A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket.

Fed. R. App. P. 4(b). Statutory authorization for this appeal is found in section 3731. That provision reads in part:

> An appeal by the United States shall lie to a court of appeals from a decision or order of a district courts [sic] suppressing or excluding evidence . . . .
>
> The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

18 U.S.C. § 3731 (1988).

1989. The government then filed its motion for reconsideration on December 13, 1989, which the district court denied on January 3, 1990. On January 30, 1990, seventy-six days after the district court entered the original order suppressing the evidence, the government filed its notice of appeal in the district court. The notice of appeal was therefore filed more than thirty days after the district court's order granting the defendant's motion to suppress.

The government directs our attention to the Supreme Court's decisions in *United States v. Healy*, 376 U.S. 75 (1964), and *United States v. Dieter*, 429 U.S. 6 (1976), however, and argues that the submission of its motion for reconsideration tolled the relevant time period to appeal. Because its notice of appeal was filed within thirty days of the district court's denial of its motion for reconsideration, the government contends, the appeal is timely and this court is therefore vested with jurisdiction.

In *Healy*, the Court held that the filing of a timely petition for rehearing in the district court tolled the thirty-day period then authorized by statute to seek direct review in the Supreme Court. The thirty-day limitations period runs from the time of the denial of the motion for rehearing, rather than from the time of the order itself. The Court reasoned that the rule serves two important functions. First, the ability of the district court to correct alleged errors may shorten the process of litigation. Second, it avoids the unnecessary expenditure of resources in the appellate court. *Healy*, 376 U.S. at 80. In *Dieter*, the Supreme Court extended the holding in *Healy* to appeals taken to the courts of appeals pursuant to 18 U.S.C. § 3731. The Court explained that "plenary consideration of an issue by an appellate court ordinarily requires more time than is required for disposition by a trial court

of a petition for rehearing. The fact that appeals are now routed to the courts of appeals does not affect the wisdom of giving district courts the opportunity promptly to correct their own alleged errors . . . ." *Dieter*, 429 U.S. at 8 (citation omitted).

The rule announced in *Dieter* and *Healy*, however, is not absolute. In *United States v. Marsh*, 700 F.2d 1322 (10th Cir. 1983), this circuit held that a motion for reconsideration of a trial court's order denying a new trial did not toll the time period in which to file a notice of appeal. There, the court focused on the defendant's evident effort to raise the same issue on consecutive occasions. It noted that, if successive motions were to toll the time to appeal, one party could theoretically postpone the appeal indefinitely. The court in *Marsh* also found it very unlikely that a redundant motion for reconsideration would succeed. The second motion instead serves only to give the movant extra time to prepare an appeal. *Accord United States v. Rothseiden*, 680 F.2d 96, 98 (11th Cir. 1982).

The question now before us is whether the filing of a motion for reconsideration that raises only a previously conceded argument tolls the time for filing a notice of appeal. The defendant argues that because the purpose and effect of the government's motion for reconsideration was not that of the motion for rehearing recognized in *Dieter*, the motion did not toll the time period for filing a notice of appeal. We agree. In our opinion, such a motion does not substantially further the goal of allowing the district court an opportunity to reconsider a point that may have been overlooked in the initial decision.[3] A concession of an

[3] The dissent concludes that our holding conflicts with *Dieter* because, under our analysis, we must reach the merits

issue is generally treated as binding on that party. *See United States v. Maez*, 872 F.2d 1444, 1457 n.18 (10th Cir. 1989); *United States v. Morales-Macias*, 855 F.2d 693, 695 n.15 (10th Cir. 1988). Moreover,

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of a movant's claim to determine jurisdiction. Dissent Op. at 6-7. In our opinion, however, we do not engage in a merit-based analysis. Although a motion for reconsideration is not specifically contemplated in the Federal Rules of Civil Procedure, it has been described as follows:

> The motion to reconsider would be appropriate where, for example, the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension. A further basis for a motion to reconsider would be a controlling or significant change in the law or facts since the submission of the issue to the Court.

Above the Belt, Inc. v. Mel Bohannon Roofing Co., 99 F.R.D. 99, 101 (E.D. Va. 1983). That statement's counterpart is contained in Fed. R. App. P. 40(a), which requires every petition for rehearing before a Court of Appeals to "state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended . . . ." In determining that a motion to reconsider a previously conceded issue does not toll the time to appeal, we determine only that the motion is not what it purports to be: it does not ask the court to reconsider a point of law or fact that it misapprehended or overlooked. The motion therefore does not have the jurisdictional effect of a proper motion for reconsideration, regardless of its merits.

Nor does this decision, in our opinion, conflict with the Supreme Court's decision in *Dieter*. To the contrary, the Court in *Dieter* recognized that although the motion before it was not captioned a "petition for rehearing," an examination of its substance demonstrated that was in effect the motion's purpose. *Dieter*, 429 U.S. at 8-9. Similarly, the Court in *Dep't of Banking v. Pink*, 317 U.S. 264 (1942), looked beyond the caption of the motion to determine its substance. We engage in the same inquiry here.

this circuit has not looked favorably on attempts by the government to raise issues it had previously conceded. *See United States v. Smith*, 781 F.2d 184 (10th Cir. 1986).[4] A motion for reconsideration of a previously conceded issue, therefore, is analogous to the successive motions for reconsideration of the same issue analyzed in *Marsh*. Generally, such a motion has very little likelihood of success and merely serves to prolong the process of litigation. We believe that a rule allowing a motion for reconsideration that raises only previously conceded issues to toll the time for filing a notice of appeal would subvert, rather than further, the concern for judicial economy.

Here, the government initially raised the issue of continuous consent in a memorandum before the trial court. However, in a subsequent brief filed prior to the evidentiary hearing, it conceded that there was no authority supporting its position and expressly retracted the argument. After the district court granted the defendant's motion to suppress the evidence, however, the government attempted to revive the issue in its motion for reconsideration. Unlike the situation in *Healey* and *Dieter*, the motion here did not request that the district court correct an alleged error of law or set aside a ruling on the grounds of mistake or inadvertence.[5] Nor did the government in its motion

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[4] In *Smith*, the court refused to permit the government to raise an issue in a petition for rehearing before the appellate court that it had previously conceded. The court reasoned that to allow a party to make such a belated and dramatic shift in position on petition for rehearing would permit piecemeal litigation. *Id.*

[5] The government notes that the district court cited *United States v. Recalde*, 761 F.2d 1448 (10th Cir. 1985), in support of the government's concession of the issue of continuing

cite contrary authority announced after it conceded the continuing consent issue, sparing the parties and the appellate court the burden of unnecessary appellate proceedings. *See United States v. Cardall*, 773 F.2d 1128 (10th Cir. 1985) (second motion raising issue that had been addressed by the Supreme Court after district court denied first motion tolled time for filing appeal).[6] The motion submitted by the government, therefore, did not ask "the District Court to 'reconsider [a] question decided in the case' in order to effect an 'alteration of the rights adjudicated.'" *Dieter*, 429 U.S. at 9 (quoting *Department of Banking v. Pink*, 317 U.S. 264, 266 (1942)).

The government nevertheless argues that its motion need only request reconsideration of the ultimate issue—the district court's holding on the suppression of the evidence—to toll the time limit for filing a notice of appeal.[7] That the legal theory on which the

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consent. It argues that its motion asked the district court to reconsider the court's citation to *Recalde*. Because the government had abandoned the theory of continuing consent, however, any correction regarding the citation would not have affected the outcome of the district court's order.

[6] The court in *Cardall* limited the holding to the facts before it. The court also noted the procedure followed in *Garcia v. Regents of the University of California*, 737 F.2d 889 (10th Cir. 1984). There, the appellant first filed a notice of appeal within the thirty-day period. The appellant then moved the appellate court for a partial remand so that the district court could consider a motion for new trial.

[7] Though not cited by the government, the Eleventh Circuit adopted similar rationale in holding that a motion for reconsideration that raised a new issue tolled the time to appeal. *See United States v. Ladson*, 774 F.2d 436, 438-39 n.3 (11th Cir. 1985). We do not consider the effect of such a motion here; we limit our consideration to where a party concedes

government based its motion had been previously conceded, the government contends, is of no practical importance. We disagree. This court has previously looked to the substance of successive motions for reconsideration to determine whether the second motion tolled the statutory period in which a notice of appeal must be filed. *Compare Cardall*, 773 F.2d at 1128 (second motion effectively raised new issue before district court) *with Marsh*, 700 F.2d at 1322 (redundant motion for reconsideration does not toll time for filing notice of appeal). We believe the same consideration should determine whether an initial motion for reconsideration tolls the time for filing a notice of appeal.

Because the government's motion for reconsideration did not toll the thirty-day statutory time period in which to file a notice of appeal, the government's notice was untimely filed. This court therefore lacks jurisdiction to review the district court's order. The appeal is DISMISSED.

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an issue already raised, invoking the reliance of the court and opposition. Nor do we reach the appropriate scope of arguments in a motion for reconsideration filed in the district court. We note, however, that this circuit has held that "[p]etitions for rehearing under Fed.R.App.P. 40(a) are permitted to enable parties to notify, and to correct, errors of fact or law on the issues already presented; they are not meant to permit parties to assert new grounds for relief." *Sierra Club v. Hodel*, 848 F.2d 1068, 1100-01 (10th Cir. 1988). *See also United States v. Head*, 737 F. Supp. 1287, 1288 (W.D.N.Y. 1990) ("The government's present constitutional argument may well have merit. But the fact remains that it was not raised before, and it would be exceptionally unfair to the defendant to allow the government, with the benefit of hindsight after having lost based on its original arguments, to use a motion for reconsideration to raise a new argument that should have been raised in the first instance.")

BALDOCK, Circuit Judge, dissenting.

The court holds that the government's otherwise timely filed motion for reconsideration did not toll the thirty-day statutory time period in which to take an appeal because the government sought reconsideration of a previously conceded issue. Ct. Op. at 11-12. This holding is plainly contrary to *United States v. Dieter*, 429 U.S. 6 (1976), in which the Supreme Court rejected the Tenth Circuit's attempt to craft distinctions (based upon the merits of the motion for reconsideration)[1] on the general rule that the government has thirty days from the district court's denial of a timely filed motion for reconsideration to appeal an order granting suppression under 18 U.S.C. § 3731 and Fed. R. App. P. 4(b). In *Dieter*, this court erroneously concluded that a motion for reconsideration did not toll the time in which to appeal a suppression order because the government sought reconsideration on the grounds of mistake and inadvertence rather that an alleged legal error committed by the trial court. 429 U.S. at 8.

Here, the court is undertaking a merits inquiry on what should be a straightforward jurisdictional inquiry. The clear import of *Dieter* is that we do not conduct a merits review of every motion for reconsideration to insure that it meets the salutary purposes of the rule which provides for tolling the time in which to take an appeal. The rule in *Dieter* and its predecessor, *United States v. Healy*, 376 U.S. 75

[1] In *Dieter*, the motion for reconsideration was termed a "petition for rehearing." *See United States v. Lefler*, 880 F.2d 233, 234 n.2 (9th Cir. 1989) (noting name of pleading is not controlling, what matters is that the pleading seeks the district court to reconsider its previous order); *accord United States v. Kalinowski*, 890 F.2d 878, 880-81 (7th Cir. 1989).

(1964), expressly recognized that "the consistent practice in civil and criminal cases alike has been to treat timely" motions for reconsideration "as rendering the original judgment nonfinal for purposes of appeal for as long as the [motion] is pending." *Dieter*, 429 U.S. at 8 (citing *Healy*, 376 U.S. at 78-79); *see also Forman v. United States*, 361 U.S. 416, 425-26 (1960). In the civil context, we do not scrutinize the grounds of motions for reconsideration under Fed. R. Civ. P. 59(e) to insure that tolling is appropriate, rather we merely apply the Supreme Court's directive in *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 59-60 (1982) and Fed. R. App. P. 4(a)(4) which provide that a timely filed Rule 59(e) motion tolls the time in which to take an appeal.

The court claims that rather than making a merits inquiry, it "determine[s] only that the motion is not what it purports to be: it does not ask the court to reconsider a point of law or fact that it misapprehended or overlooked." Ct. Op. at 8-9 n.3. Belying this assertion is the court's discussion of the merits which all but decides that once an issue is conceded, it cannot be resurrected. *Id.* at 10. Claiming to be consistent with *Dieter* and *Pink*, the court then allows that it merely is "look[ing] beyond the caption of the motion to determine [the motion's] substance." *Id.* at 8-9 n.3. No need exists in this case to look beyond the caption to determine the function of this motion: the government filed a "Motion for Reconsideration of Suppression Order."[2] By "'traditional and vir-

[2] In *Dieter*, the Court construed a "motion to Set Aside Order of Dismissal" as a petition for rehearing. *Dieter*, 429 U.S. at 7-8. In *Pink* the Court construed a motion seeking to have the New York Court of Appeals "amend its remit-

tually unquestioned practice,'" this post-suppression order suspended the time in which to file an appeal, *see Dieter*, 429 U.S. at 8 n.3 (quoting *Healy*, 379 U.S. at 79). Under *Dieter*, *Healy* and *Pink*, the movant only need claim that the district court's decision was somehow incorrect and that the order should be altered. *See Dieter*, 429 U.S. at 8; *Healy*, 376 U.S. at 80; *Pink*, 317 U.S. at 266. Only when the motion is filed in bad faith might the court's approach be justified.[3] Though the government's motion for reconsideration appears meritless, no showing of bad faith has been made in this complex, multi-issue suppression case.

In the criminal context, "for a motion for reconsideration to extend the time for appeal, (1) the motion for reconsideration must be filed within the period during which an appeal could have been noticed from the original order, and (2) the notice of appeal must be filed within the required period following the order on the motion for reconsideration." *United States v. Lefler*, 880 F.2d 233, 234 (9th Cir. 1989). These requirements plainly are met in this case.[4]

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titur by adding to it" an additional statement. 317 U.S. at 266.

[3] In *Healy*, the Court discussed a requirement of good faith.

> In this case, the record and legal issues plainly indicate the good faith of the Government in petitioning for rehearing. We would, of course, not countenance the United States' using such petitions simply as a delaying tactic in criminal litigation; there is, however, not the slightest basis for believing that it would try to do so.

376 U.S. at 80 n.4.

[4] The government's motion for reconsideration was filed on December 13, 1989, twenty-eight days after the district court's November 15, 1989 suppression order, and within the applicable thirty-day period in which the government could

No good reason exists to disregard the consistent rule in civil and criminal cases that a single motion for reconsideration of a district court's order tolls the time for filing a notice of appeal.[5] This court relies on cases involving *successive* motions for reconsideration which are factually inapposite. One of those cases, *United States v. Cardall*, 773 F.2d 1128 (10th Cir. 1985), determined that the government's *second* motion for reconsideration tolled the time in which to take an appeal after analyzing the grounds of that second motion. *Id.* at 1130. The *Cardall* court implicitly recognized that, under *Dieter*, the first motion for reconsideration tolled the time in which to file a notice of appeal. *Cardall*, 773 F.2d at 1130. We have recognized that a motion for rehearing or reconsideration filed within thirty days tolls the time for the government to file a notice of appeal under Fed. R. App. P. 4(b). *United States v. Martinez*, 681 F.2d 1248, 1252-54 (10th Cir. 1982); *see also United States v. Rodriguez*, 892 F.2d 233, 235 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1791 (1990).

Another case relied upon by the court, *United States v. Marsh*, 700 F.2d 1322 (10th Cir. 1983), also

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appeal. The government's notice of appeal was filed on January 30, 1990, twenty-seven days after the district court's January 3, 1990 order denying reconsideration and again within the applicable thirty-day period in which the government could appeal. Accordingly, the government's appeal was timely.

[5] Indeed, the harsh and administratively complicated rule adopted by the court is inconsistent with our newfound charity concerning premature notices of appeal in both the civil and criminal contexts. *See Lewis v. B.F. Goodrich*, 850 F.2d 641, 643-46 (10th Cir. 1988) (en banc); *United States v. Green*, 847 F.2d 622, 624-25 (10th Cir. 1988) (en banc).

applies to *successive* motions for reconsideration. In *Marsh*, we considered whether a motion for reconsideration of an order denying a new trial tolled the time in which to file a notice of appeal. We concluded that the motion for reconsideration did not toll because the motion for a new trial served an identical function, thus rendering the second motion for reconsideration successive: "Marsh is not entitled to two bites, so to speak. [H]e is not entitled to two motions for rehearing, and that is what, in substance is sought." 700 F.2d at 1324. *Marsh* relied upon *United States v. Rothseiden*, 680 F.2d 96 (11th Cir. 1982), which determined that a trial court's second denial of the government's motion for reconsideration does not toll the time in which to file a notice of appeal because "successive tolling is not allowed." *Id.* at 97; *See Marsh*, 700 F.2d at 1325-26 (discussing *Rothseiden*); *see also* Ct. Op. at 8 (citing *Rothseiden*). Importantly, the court in *Rothseiden*, remanded to the district court for a finding of whether the government's untimely filing was the product of excusable neglect under Fed. R. App. P. 4(b).[6]

According to the court, Ct. Op. at 11, the government's motion for reconsideration did not request "the District Court to 'reconsider [a] question decided in the case' in order to effect an 'alteration of the rights adjudicated." *Dieter*, 429 U.S. at 9 (quoting *Department of Banking v. Pink*, 317 U.S. 264, 266 (1942)).

[6] Given the court's decision, that option is not available here because seventy-six days passed between the district court's initial order and the government's filing of a notice of appeal. *See* Fed. R. App. P. 4(b) (allowing district court to extend the time for filing a notice of appeal in a criminal case by 30 days upon a showing of excusable neglect).

Not so. This is not a situation like that in *Pink* where "[t]he final judgment already rendered was not challenged; what was sought was merely the court's certification that a federal question had been presented to it for decision, and this could have no different effect on the finality of the judgment than a like amendment of the court's opinion." *Pink*, 317 U.S. at 266. Rather, the government's motion plainly sought "alteration of the rights adjudicated" and challenged "[t]he final judgment already rendered," *id.*; had the district court granted the motion the evidence in question would not have been suppressed.

The government claimed in its motion to have discovered new legal authority on the continuing consent issue and requested that "the evidence not [be] subject to suppression." Rec. vol. I, doc. 39 at 1, 11. To be sure, the government had conceded this issue earlier, but the government's right to appeal the suppression order (which contains many other appealable issues) should not be abrogated merely because the government exercised its right to file a motion for reconsideration on grounds obviously viewed with disfavor by this court. Notwithstanding the district court's gratuitous comments about the characterization of the motion, *see United States v. Ibarra*, 731 F. Supp. 1037, 1039 n.2 (D. Wyo. 1990), and contrary to the district court's claim that it lacked an evidentiary basis to proceed, *id.* at 1039, the district court reached the merits of the motion for reconsideration and then published its order denying same. *Id.* at 1039-41.

The approach taken by this court conflicts with the correct approach taken by the Eleventh Circuit in *United States v. Ladson*, 774 F.2d 436, 438-39 n.3 (11th Cir. 1985). *See* Ct. Op. at 11 n.7 (discussing

Ladson). In *Ladson*, the defendants argued that the motion was based upon *new* grounds and consequently did not ask the district court to "reconsider" anything. Rejecting this argument, the court stated: "In fact, however, the motion did ask the court to reconsider something: its ultimate holding on the suppression issue." *Ladson*, 774 F.2d at 438 n.3. The same request was made of the district court in this case. The *Ladson* court also rejected an approach which would condition tolling on whether the issues to be appealed had been presented in the motion for reconsideration. *Id.* at 439 n.3. Under this approach, tolling would have been allowed only as to the one new issue raised in the motion for reconsideration, despite the presence of other appealable issues. *Id.* Rejecting this alternative, the court noted such an approach was inconsistent with *Dieter* and stated: "We decline to introduce additional complications into the lives of would-be appellants." *Id.*

The approach taken by this court conflicts with *Dieter* because it portends an evaluation of whether the claims raised in the motion for reconsideration are new or old (valid or invalid) for jurisdictional purposes. While such inquiry may be wholly appropriate in deciding the *merits* of the appeal, it has no place in deciding our jurisdiction when the government has exercised its right to timely file a single motion for rehearing and perfects a timely appeal. The government was not required to ask the district court "to reconsider every appealable issue [or even another appealable issue], even when to do so would surely be fruitless, or lose the benefit of *Dieter*." *Ladson*, 774 F.2d at 439 n.3. I respectfully dissent because the court has grafted a merits inquiry onto what should be a bright-line jurisdictional inquiry. I would reach the merits of this appeal.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. CR89-0025J

UNITED STATES OF AMERICA, PLAINTIFF

v.

ALEJANDRO GARCIA IBARRA, DEFENDANT

ORDER DENYING GOVERNMENT'S
MOTION FOR RECONSIDERATION

[Filed Jan. 5, 1990]

THE ABOVE CAPTIONED MATTER came before the court on December 27, 1989, for hearing on the government's motion for reconsideration of this court's November 15, 1989, memorandum opinion and order granting the defendant's May 10, 1989, motion to suppress evidence. The defendant, Alejandro Garcia Ibarra, is charged in a one count indictment with possession of cocaine with intent to distribute it in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(ii). On September 12, 1989, the case came before the court for an evidentiary hearing on the defendant's motion to suppress, which the court granted after carefully considering the arguments of counsel for the government and the defendant in light of the evidence presented.

The court will not recite in detail the facts of this case because they are already found in its November

15, 1989, memorandum opinion and order, *United States v. Ibarra*, No. Cr89-0025J, slip op. (D. Wyo. Nov. 15, 1989). On March 24, 1989, Ibarra and a friend were traveling at a lawful rate of speed in a 1981 Oldsmobile Cutlass with California plates east through southern Wyoming on Interstate 80 (I-80). At that time, Wyoming highway patrolman Scott Mahaffey noticed the car because its driver, Ibarra, appeared to be driving slightly below the speed limit. After following the vehicle for approximately five miles, Mahaffey stopped Ibarra because he noticed that Ibarra "weaved," and abruptly passed two other vehicles without signaling.

After informing Ibarra why he stopped him, Mahaffey discovered that Ibarra's driver's license had been suspended for failure to pay a reissue fee and that Ibarra had recently purchased the vehicle from a Mr. Charles J. Petrocchi. Ibarra was issued a citation for the license problem for which he posted a $220-appearance bond. Meanwhile, a second Wyoming highway patrolman, Gregory Leazenby, arrived at the scene and sat in the back of Mahaffey's patrol car and observed the interchange between Mahaffey and Ibarra. Ibarra, who is from Mexico and evidently speaks halting English,[1] aroused Mahaffey's suspicions by giving conflicting answers about his itinerary.

His suspicions aroused, Mahaffey asked Ibarra three questions, which appear to have become routine among Wyoming highway patrolmen. He asked if the vehicle contained any "weapons, large amounts of money, or controlled substances," to which Ibarra replied "no." Mahaffey then obtained Ibarra's permission to look in the trunk, the search of which revealed

[1] At the suppression hearing, Ibarrra was assisted by a court appointed interprete in understanding the proceedings.

nothing illegal. When it was discovered that Ibarra's friend also had an expired driver's license, Mahaffey, without consulting with Ibarra, radioed for a wrecker to tow the vehicle into Laramie, which was a short distance away. In its prior order, the court found that this was done without lawful authority and was motivated by an investigatory motive, rendering any inventory search unreasonable under the fourth amendment. *Ibarra*, Cr. No. 89-0025J, slip op. at 17 and 23.

The officers then separated Ibarra and his friend and drove them in their respective patrol cars to a motel in Laramie. Immediately after leaving them there, the officers proceeded to the place where Ibarra's vehicle had been towed and, believing they still had his consent, searched the vehicle again. The search revealed approximately one kilogram of cocaine for which Ibarra was later indicted by a federal grand jury.

In its original opposition to the defendant's motion to suppress, the government argued that the second warrantless search was valid under a continuing consent theory. *See* United States' Supplemental Memorandum In Support of Proposed Findings of Fact And Conclusions of Law at 1. Prior to the suppression hearing, however, the government abandoned the theory of continuing consent, stating that "[c]ontrary to its prior-stated position, the United States no longer argues that the second search of the Defendant's vehicle is supportable on the basis of continuing consent. Additional research has failed to provide legal support for this position, and the argument is conceded." United States Supplemental Memorandum In Support of Proposed Findings of Facts and Conclusions of Law at 1. Thus, at the suppression hear-

ing held on September 12, no evidence was presented on this issue and the court decided the motion on the issues whether the search was a valid inventory search or whether the search was valid under the "inevitable discovery" doctrine. The court also decided the issue whether the stop of Ibarra's vehicle was a pretext to investigate more serious unrelated crime for which the officer had neither probable cause nor reasonable suspicion to justify a detention. Although it resolved the pretext issue in favor of the government, the court found that the issue presented a close call.

The title of the government's motion is a misnomer because it now asks the court to "reconsider" an issue that was never considered by the court. Instead, the government is asking the court to decide a new issue for which no record was specifically developed.[2] The court decided the motion to suppress on issues for which an adequate factual basis was developed during a long evidentiary hearing. The court issued its ruling only after carefully considering the evidence presented.

The government now argues that it has found caselaw that supports a "continuing consent" theory. The government has the burden of proving that Ibarra

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[2] Whether the motion is in fact one for reconsideration is relevant for purposes of appeal in this case. A motion for reconsideration in a criminal case tolls the 30 days in which the government may file its notice of appeal, provided such a motion is in fact one for reconsideration and filed within the 30-day period. *See, e.g., United States v. Kalinowski*, No. 88-3009, slip op. (7th Cir. Nov. 15, 1989) (citing *United States v. Healy*, 376 U.S. 75, 77-80 (1964)). *See also United States v. Marsh*, 700 F.2d 1322 (10th Cir. 1983) (motion for reconsideration of trial court's order denying new trial did not toll time in which to file notice of appeal).

freely and voluntarily consented to a warrantless search of his vehicle. *United States v. Recalde*, 761 F.2d 1448, 1453 (10th Cir. 1985). The government, of course, must present "clear and positive testimony that the consent was unequivocal and specific . . . [and] establish that the consent was given without duress or coercion." *Id.* Because a warrantless search conducted pursuant to a "continuing consent" is an exception to the fourth amendment's warrant requirement, the government likewise must prove that Ibarra in fact gave a "continuing consent" to the officers' second search of his vehicle. *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971) (government has burden of showing that a search comes within one of the exceptions to the fourth amendment's warrant requirement). The court must view the evidence presented with a presumption that the defendant did not waive his constitutional right to be free from an unreasonable warrantless search. *Villano v. United States*, 310 F.2d 680, 684 (10th Cir. 1962).

In support of its theory, the government relies principally on the following cases: *United States v. White*, 617 F.2d 1131 (5th Cir. 1980); *Phillips v. State*, 625 P.2d 816 (Alaska 1980); *Ferguson v. Caldwell*, 233 Ga. 887, 213 E.E.2d 855 (1975); *State v. Luther*, 663 P.2d 1263 (Or. Ct. App. 1983); *Gray v. State*, 441 A.2d 209 (Del. Super. Ct. 1982); *People v. Trujillo*, 576 P.2d 179 (Colo. App. 1977); and *People v. Nawrocki*, 6 Mich. App. 46, 148 N.W.2d 211 (1967). In reviewing those cases, the court finds that in none of them did the defendant ever withdraw his consent to search. Nor did the courts in those cases find an unlawful seizure of the object searched.

At the September 12 suppression hearing, the evidence showed that Ibarra closed and locked the trunk

upon the conclusion of the officer's first warrantless search. At some point the officers decided to impound the vehicle to conduct a second investigatory search of it. They never informed Ibarra that a second warrantless investigatory search would be conducted. The court finds that "[t]he act of locking the [trunk] effectively revoked the [defendant's] consent to any future searches" of his vehicle. *Cooper v. State*, 480 So.2d 8, 11 (Ala. Crim. App. 1985). This rule is in harmony with the general principle that "except in unusual circumstances, it would seem that a consent to search may be said to be conducted forthwith and that only a single search will be made." 3 La Fave, Search and Seizure, § 8.1(c), at 170 (2d ed. 1987). The government must show that by closing and locking the trunk, Ibarra did not revoke his consent to additional searches.

In attempting to discharge this burden, the government merely argues that Ibarra's act of locking the trunk did not constitute a revocation of consent because the officers subsequently gained possession of the keys to the vehicle. The government's argument, however, overlooks the fact that the officers gained possession of the keys after Ibarra closed and locked the trunk. Further, their gaining possession of the keys was incident to an unlawful seizure of Ibarra's vehicle, thereby making it difficult if not impossible to conclude that such an act constituted a specific and unequivocal second consent to a later search of which Ibarra was never informed would in fact occur. The issue of unlawful seizure, that is, a fourth amendment violation, was, of course, nonexistent in the cases cited to the court by the government. Even assuming Ibarra did not revoke his consent by closing and locking the trunk, the court finds that any "continuing consent" became infected by a fourth amendment violation, the seizure of Ibarra's vehicle for the purpose of conducting an investigative search.

The fourth amendment protects 'effects' as well as people from unreasonable searches and seizures." *United States v. Place*, 462 U.S. 696, 716 (1983) (Brennan, J., concurring). Under the fourth amendment, law enforcement officers may seize one's personal property and briefly detain it for investigative purposes where there exists a minimum level of objective justification based on "reasonable, articulable suspicion" to believe it contains contraband or evidence of a crime. *Id.* at 706. *See also United States v. Bell*, No. 88-1396, slip op. at 18 (10th Cir. Dec. 22, 1989) (seizure of personalty justified under the fourth amendment where police have " 'reasonable, articulable suspicion, premised on objective facts' " that it contains contraband or evidence of a crime). Absent valid consent to search, the court generally must suppress evidence obtained as a result of an unlawful seizure of personalty such as luggage or in this case the defendant's automobile. *Place*, 462 U.S. at 710.

At the hearing, it was revealed under questioning by the court that the officers had the vehicle towed so that they could search it in a more secure location. *See Ibarra*, No. CR.89-0025J, slip op. at 23. Although they had consent to conduct the first search on the highway, they at no time obtained Ibarra's consent to seize his vehicle. The evidence showed that Ibarra was informed that the vehicle was to be impounded after officer Mahaffey radioed for a tow truck, which occurred after Ibarra had locked the trunk and before the officers gained possession of the keys. Ibarra was never given an option to provide for the disposition of

his car. Instead, the officers seized it without Ibarra's permission for the purpose of conducting a second investigatory search for contraband. A seizure for this purpose could be justified on nothing less than probable cause. *See, e.g., Place*, 462 U.S. at 706 (if purpose of seizure is to search, it must be based on probable cause). At the hearing, however, the government did not even present evidence that the officers had a reasonable, articulable suspicion that the car contained illegal drugs, much less probable cause. In any event, reasonable suspicion under *Terry* would have been insufficient to justify a seizure and subsequent warrantless investigatory search of the vehicle. Thus the seizure of the vehicle was unlawful under the fourth amendment.

Where a consent is tainted by a fourth amendment violation, the court must determine whether the consent, under the totality of the circumstances, "was sufficiently an act of free will to purge the primary taint of the" prior police misconduct. *United States v. Maez*, 872 F.2d 1444, 1454 (10th Cir. 1989). When it is obtained after a fourth amendment violation "there must be a break in the causal connection between the illegality and the evidence thereby obtained." *Id.* In determining this issue the court looks to the following factors: "[t]he temporal proximity of the . . . [prior police misconduct] and the . . . [evidence obtained], the presence of intervening circumstances, and particularly, the purpose and flagrancy of official misconduct . . . ." *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975). Here the temporal proximity between the illegal seizure of Ibarra's vehicle and his alleged "continuing consent" to the subsequent search convinces the court that the taint was not purged in that the two occurred almost simultaneously. Further, Ibarra was separated from his vehicle

and transported by one of the officers to a location where he was left for the duration of the second search, which occurred shortly thereafter. A second consent to this search was never obtained. Certainly it cannot be said that some intervening circumstance purged the trait of the unlawful seizure. Finally, although officer Mahaffey candidly testified that he thought he had a continuing consent to search, the seizure itself was motivated by an investigatory purpose for which he lacked probable cause to believe the vehicle contained contraband. Despite this motive and lack of probable cause he failed to inform Ibarra that such a search would in fact be conducted outside his presence.

The government did not present any evidence concerning the specific circumstances under which the officers obtained possession of the car keys other than they were obtained in connection with the seizure of the vehicle. The court must conclude that the government has failed to prove that the officers searched Ibarra's vehicle pursuant to a "continuing consent" or that by gaining possession of Ibarra's car keys the officers obtained Ibarra's specific and unequivocal consent to a second investigatory search, which occurred not only after the vehicle had been taken miles from where the first search was conducted, but equally important, occurred outside the presence of the defendant.[3] Assuming Ibarra did not revoke his con-

[3] It is well recognized principle of constitutional law that a person has a right to revoke his consent to a warrantless se[illegible]h at any time before the discovery of contraband. *United S[illegible]es v. Dyer*, 784 F.2d 812, 816 (7th Cir. 1986). In arguing that the officers conducted the second investigatory search pursuant to Ibarra's supposed continuing consent, the government substantially dilutes the defendant's right to revoke his consent. Assuming there was a continuing consent, which

sent to subsequent searches, any "continuing consent" was tainted by a fourth amendment violation for which no intervening, attenuating event occurred to dissipate that taint.

Despite the government's concerns to the contrary, the court does not rely on *Recalde*, 761 F.2d 1448, for its concluding that the officers had to obtain a second consent before conducting a second search.[4] The court merely states the unremarkable proposition that where there is evidence of a revocation of consent, as there is in this case, the government must prove that the police obtained a second consent to a subsequent search. *Recalde*, not being to the contrary, IT IS HEREBY ORDERED that the government's motion on the continuing consent issue be DENIED.

Dated this 3d day of January 1990.

/s/ Alan S. Johnson
United States District Judge

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the court finds that the government has failed to prove, the officers, by conducting the second search in the defendant's absence, cut off the defendant's right to revoke his consent. Thus the court would be reluctant to find a continuing consent where the officers fail to inform the defendant that a second search is going to be conducted in his absence.

[4] In *Recalde*, as in this case, police officers conducted a second warrantless search of the defendant's vehicle after they unlawfully seized both the vehicle as well as the defendant. Ibarra, of course, does not argue that the officers unlawfully seized his person. Unlike in this case, however, the officers obtained the defendant's second consent, which the Tenth Circuit found vitiated by the unlawful seizure of the defendant. Although in *Recalde* the court did not state whether there was any evidence that upon conclusion of the first search the defendant revoked his consent, it nevertheless analyzed the validity of the second search in light of the facts under which the officers obtained the defendant's second consent.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

Docket No. CR89-0025J

UNITED STATES OF AMERICA, PLAINTIFF

v.

ALEJANDRO GARCIA IBARRA, DEFENDANT

MEMORANDUM OPINION AND ORDER RULING ON MOTION TO SUPPRESS EVIDENCE

[Filed Nov. 15, 1989]

On March 24, 1989, Alejandro Garcia Ibarra and his friend, Maria Linares, were traveling at a lawful rate of speed in a white 1981 Oldsmobile Cutlass with California tags east through Wyoming on Interstate 80. At that time, Wyoming Highway Patrolman Scott Mahaffey noticed the car because its driver, Ibarra, appeared to be driving at a rate of speed slightly slower than other traffic. He also observed that the car appeared to "weave" within its marked lane of traffic. Thinking that the driver of the car was intoxicated, Mahaffey followed the vehicle for approximately five miles during which he saw the vehicle pass two other vehicles by making what he characterized as "abrupt lane changes without the use of turn signals." At the time that the vehicle made one of the passes, Mahaffey noticed that the vehicle almost cut off a pickup truck. After observing intermittent weaving, Mahaffey stopped the vehicle to determine whether the driver was intoxicated.

Before getting out of his patrol car, Mahaffey noticed there were two persons in the Oldsmobile. He then stepped out of his patrol car and approached the driver's side of Ibarra's vehicle and asked him for his driver's license, which Ibarra promptly produced. When Mahaffey informed Ibarra that he stopped him for failing to signal before passing and for weaving, Ibarra responded that he thought he had signaled, but perhaps he had not. Mahaffey returned to his patrol car where he issued a warning ticket to Ibarra for failing to signal when passing. Although Mahaffey stopped Ibarra on suspicion of drunk driving, he failed to pursue an investigaiton of this possible offense other than by conducting a cursory observation of Ibarra's appearance and behavior.

While in his patrol car, Mahaffey requested that his dispatcher check Ibarra's driver's license. The dispatcher indicated that Ibarra's license had been suspended for failure to pay reissue fees. Using his loud speaker, Mahaffey then requested that Ibarra bring the vehicle registration to him. He told Ibarra about his suspended driver's license and that he would issue a citation to him for operating a motor vehicle with a suspended license, which required that Ibarra post a $220 appearance bond. Ibarra returned to his vehicle where he obtained the money for the bond, which he then gave to Mahaffey. Mahaffey, however, found a potential problem with the vehicle's registration, which showed that the vehicle belonged to Charles J. Petrocchi. Ibarra explained that he recently purchased the vehicle from Mr. Petrocchi. Because the ownership certificate and the registration did not indicate a transfer of ownership to Ibarra, Mahaffey requested that the dispatcher contact Petrocchi to determine the vehicle's ownership status.

Meanwhile, a second Wyoming highway patrolman, Gregory Leazenby, arrived at the scene and sat in the back of Mahaffey's patrol car.

After paying the bond, Ibarra stated he had only about $40 left with which to travel to Chicago. Mahaffey then proceeded to question Ibarra about his itinerary to which Ibarra reportedly gave conflicting answers. Ibarra first stated he was traveling to Chicago to visit friends. Mahaffey inquired whether Ibarra's friends in Chicago could send money to him to which Ibarra answered that he would need to call them and ask. Mahaffey continued his questioning and asked whether Ibarra's friends in Chicago were "friends" or "relatives." Ibarra replied "cousins." Upon further inquiry by Mahaffey, Ibarra stated he was moving to Chicago. Observing that Ibarra was traveling "light," Mahaffey became suspicious and asked Ibarra if the vehicle contained any "weapons, large amounts of money, or controlled substances" to which Ibarra answered, "No." Mahaffey then asked if he "could look at the contents" of Ibarra's car. Ibarra agreed. When the officers and Ibarra got out of the patrol car, Mahaffey asked Ibarra if he could look in the trunk. Without responding, Ibarra opened the trunk, which revealed several nylon bags. Without asking whether he could search these bags, Mahaffey opened them but discovered nothing unusual. Mahaffey then began to search the passenger compartment, while Leazenby continued searching the trunk.

After completing the search of Ibarra's vehicle, which revealed nothing illegal, Mahaffey informed Linares that Ibarra could not drive the car and that she would need to drive it provided she had a valid driver's license. Linares's driver's license, however, turned out to be expired. At this point, Mahaffey,

without consulting with Ibarra, called for a private wrecker to tow Ibarra's vehicle into Laramie, which was a short distance away. He then informed Ibarra that he needed to find a licensed driver before the car would be released.

The officers then separated Ibarra and Linares, and transported them in separate patrol cars to the Western Union station in Laramie. The officers took them there so that they could wire for extra money and find a licensed driver. During the trip to town, Mahaffey used his radio to speak to Charles Petrocchi's wife, who was then in telephonic contact with Mahaffey's dispatcher. Mrs. Petrocchi confirmed that her husband had in fact sold the vehicle to Ibarra. Mahaffey also discovered at this time that Ibarra had no liability insurance for the vehicle, which is mandatory in Wyoming.

After dropping off Ibarra and Linares at the Western Union station, the officers went to Warren's towing, the place where Ibarra's vehicle had been towed. Thinking they still had Ibarra's consent to search, they renewed their search of Ibarra's vehicle. While searching the trunk, Mahaffey noticed a plastic bag behind the spare tire and, after removing it, he found several clear plastic gloves and a large package wrapped with duct tape. Though a cut in the tape he saw a white powdery substance that turned out to be cocaine. Leazenby returned to the Western Union station to arrest Ibarra and Linares. Ibarra was later indicted by a federal grand jury for possession of cocaine with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(D)(ii). On May 10, 1989, Ibarra filed a motion to suppress all evidence seized during the search and all evidence obtained therefrom, on the ground that the search

violated the Fourth Amendment to the United States Constitution for four reasons: (1) the initial stop was unconstitutionally pretextual; (2) he revoked his consent before the second search occurred, (3) the seizure of his vehicle—i.e. impoundment—was unlawful; and (4) his initial consent to search was not freely and voluntarily given. The case came before the court for an evidentiary hearing held on September 12, 1989.

With few exceptions, the fourth amendment protects our right to privacy by prohibiting police from conducting searches without a warrant issued by a detached and neutral magistrate or court upon probable cause. "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the fourth amendment—is basic to a free society." *Wolf v. Colorado*, 338 U.S. 25, 27 (1949). To give effect to the fourth amendment's guarantee against unreasonable searches and seizures, and to deter illegal police conduct, the court must apply the exclusionary rule and suppress any evidence unconstitutionally obtained. *Nix v. Williams*, 467 U.S. 431, 442-43 (1984); *Wong Sun v. United States*, 371 U.S. 471, 484 (1963); *Weeks v. United States*, 232 U.S. 383 (1914).

Some of the exceptions to the fourth amendment's warrant requirement include the following: (1) a limited warrantless search following an arrest, *Chimel v. California*, 395 U.S. 752 (1969); (2) A warrantless search of a vehicle as well as a warrantless search of all containers found therein where probable cause exists to believe the vehicle contains contraband, *United States v. Ross*, 456 U.S. 798, 825 (1982); (3) a warrantless search done pursuant to consent, *Schneckloth v. Bustamonte*, 412 U.S. 218,

119 (1973); (4) a warrantless inventory search of a vehicle conducted after the vehicle has been lawfully impounded by police, *South Dakota v. Opperman*, 428 U.S. 364 (1976) (plurality opinion). The government, of course, has the burden of showing by a preponderance of the evidence that a warrantless search comes within one of the exceptions to the fourth amendment's warrant requirement. *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971).

The court examines first Ibarra's argument that the evidence should be suppressed because the traffic stop was a pretext for Mahaffey to investigate more serious and unrelated criminal conduct for which he did not have reasonable suspicion needed to justify a detention. It is well established that a stop by police of a vehicle to detain its occupants, no matter how brief and limited its purpose, is a seizure within the meaning of the fourth amendment. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). Police may stop a vehicle traveling on a public highway whenever the vehicle is being driven in violation of the state's motor vehicle laws. *Id.* at 663; *see also United States v. Neu*, 879 F.2d 805 (10th Cir. 1989). The scope of a police officer's actions during a traffic stop is limited generally to asking the driver for his license and vehicle registration, running an NCIC check, and issuing a warning or citation. *United States v. Guzman*, 864 F.2d 1512, 1519 (10th Cir. 1988). In a traffic stop, the officer must allow the driver of the vehicle to proceed on his way, without further delay by additional questioning, once "the driver has produced a valid license and proof that he is entitled to operate the car" unless the officer has a reasonable suspicion that another serious crime is transpiring. *Id.* at 1519.

A routine traffic stop for a minor traffic infraction may be unconstitutional, however, where the stop is a pretext for investigating more serious criminal conduct for which the officer has neither reasonable suspicion nor probable cause to justify a detention. *Guzman*, 864 F.2d at 1515. The court, therefore, must apply the exclusionary rule and suppress any evidence seized during a stop that it finds unconstitutionally pretextual. *Id.* at 1518. In *Guzman*, the Tenth Circuit adopted the following test developed by the Eleventh Circuit for determining whether a traffic stop is unconstitutionally pretextual: "'A court should ask—not whether the officer *could* validly have made the stop, but whether under the same circumstances a reasonable officer would have made the stop in the absence of the invalid purpose.'" *Guzman*, 864 F.2d at 1517 (quoting *United States v. Smith*, 799 F.2d 704, 709 (11th Cir. 1986)). (Emphasis supplied by the court in *Smith*.) In *Smith*,[1] the court explained:

> That an officer theoretically *could* validly have stopped the car for a possible traffic infraction [i]s not determinative. Similarly immaterial [i]s the actual subjective intent of the deputy. [A] stop [i]s unreasonable not because the officer

[1] *Smith* is factually similar to this case. There, the officer stopped a vehicle because it met the criteria of a drug courier profile. The officer stated, however, he had both probable cause or reasonable suspicion for the stop because the car was traveling slightly below the speed limit and it occasionally weaved within its lane of traffic. The court "conclude[d] that a reasonable officer would not have stopped the car absent an additional, invalid purpose." 799 F.2d at 711. Unlike here, however, the officer admitted he stopped the car based on a drug courier profile.

> secretly hope[s] to find evidence of a greater offense, but because it [i]s clear that an officer would have been uninterested in pursuing a lesser offense absent that hope.

799 F.2d at 710 (emphasis in original). Thus, the resolution of this issue depends on whether Mahaffey's stop of Ibarra was objectively reasonable.

Under the traffic laws of Wyoming, "[a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from the lane until the driver has first ascertained that the movement can be made with safety." Wyo. Stat. § 31-5-209(a)(i) (Jun. 1989). This law specifically applies to any road "divided into two or more clearly marked lanes," and therefore includes an interstate. Notably absent from the statute is the requirement that a driver signal before changing lanes. Although this statute does not require that a signal be used prior to a lane change, the requirement of a signal appears to be imposed by a different statute, which provides "no person shall turn a vehicle or move right or left upon a roadway unless and until the movement can be made with reasonable safety nor without an appropriate signal in the manner provided by this section." Wyo. Stat. § 31-5-217(a) (Jun. 1989). The manner of the signal appears to be provided in subsection (b), which states that "a signal of intention to turn right or left when required shall be given continuously during not less than the last 100 feet traveled by the vehicle before turning."

Ibarra argues that this statute does not require that a motorist signal before passing. It is beyond dispute, however, that the statute does require that a motorist pass only after he can do so with reasonable safety. At the hearing in this matter, the officer

testified that he observed Ibarra cut off a second vehicle while passing, which would indicate a possible violation of Wyo. Stat. § 31-5-209(a)(i). Additionally, Mahaffey testified that Ibarra made both passes abruptly and that he weaved intermittently. It would therefore appear that Mahaffey had both probable cause as well as a reasonable suspicion to stop and detain Ibarra. *See, e.g., Norman v. State*, 747 P.2d 520, 521-22 (Wyo. 1987) (erratic driving probable cause to stop). Although this is a close case on the pretext issue and is similar to *Smith*, the court finds under the circumstances that a reasonable officer would have been interested in stopping Ibarra independent of any hope that he was engaged in more serious criminal conduct.

Ibarra next argues that even assuming the first search was constitutional, the second was not because Ibarra had affirmatively revoked his consent to search when he closed and locked the trunk. Initially the Government argued that the second search was conducted pursuant to Ibarra's "continuing consent." Prior to the suppression hearing in this matter, however, the Government abandoned this position and argued instead that although the second search was illegal, *see, generally United States v. Recalde*, 761 F.2d 1448 (10th Cir. 1985) (second search after the vehicle has been seized requires a second consent), it nevertheless should be upheld under the "inevitable discovery doctrine," in that the cocaine would have been discovered eventually when the officers conducted an inventory search of the vehicle. The Government's argument, of course, assumes that the officers could have conducted such a search.

An inventory search will be upheld only if it is reasonable under the fourth amendment in light of

the facts and circumstances of the particular case. *Opperman*, 428 U.S. at 375. The purposes for an inventory search are to protect the owner's property while in police custody; to protect the police against claims of lost or stolen property; and to protect the police from potential danger. *Id.* at 369. In *Opperman*, the defendant's vehicle had been seized by police and impounded for numerous parking violations. After impounding the vehicle, the police conducted an inventory search and discovered contraband, which the defendant sought to have suppressed on fourth amendment grounds. In a plurality opinion, the Supreme Court upheld the search, finding that the "police were indisputably engaged in a caretaking search of a *lawfully* impounded vehicle," and that "[t]he owner, having left his car illegally parked for an extended period, and thus subject to impoundment, was not present to make other arrangements for the safekeeping of his belongings." *Id.* at 375 (emphasis added). Under *Opperman* an inventory search is reasonable when, at a minimum, it is incident to a lawful impoundment and not conducted as "a pretext concealing an investigatory police motive." *Id. See also United States v. Hellman*, 556 F.2d 442, 444 (9th Cir. 1977) (inventory search unlawful when motivated by investigatory purposes); *Benavides v. State*, 600 S.W.2d 809, 810 (Tex. Cr. App. 1980) (inventory search reasonable where impoundment is lawful). *Opperman* therefore establishes the unremarkable proposition that police may impound a vehicle where it impedes traffic or threatens public safety due to its immobilization or violation of a parking ordinance. 428 U.S. at 368. In *Benavides*, however, the court listed six additional categories under which the police may lawfully impound a vehicle:

> These included impoundment where the owner or operator requested or consents to it; where the vehicle is stolen or the police reasonably believe it to be stolen; if the vehicle is abandoned, a hazard or so mechanically defective that it creates a hazard; if the driver is arrested for being intoxicated and there is no other person to drive or safeguard the vehicle; when the police are authorized by statute to impound the vehicle; and where the driver is placed under custodial arrest and no other alternatives are available to ensure the protection of the vehicle.

Reamey, Reevaluating the Vehicle Inventory, 19 Crim. L. Bul. 325, 328 (1983) (citing *Benavides*, 600 S.W.2d at 811). Absent these factors, taking custody of a vehicle would be an unlawful seizure. These, however, are only rough categories so that in evaluating whether an inventory search is lawful the court must find that the impoundment was prompted by "some reasonable necessity." *State v. McDaniel*, 156 N.J. Super. 347, 383 A.2d 1174, 1179 (1978). In *McDaniel* the court emphasized a showing of reasonable necessity as follows:

> The common theme underlying these cases and others is that something more must be shown to justify impoundment of a car *than that it would otherwise be left unattended.* There must be a showing that some reasonable necessity prompted the impoundment. This is a salutary rule, for otherwise police would be authorized to freely stop a car for a minor traffic infraction, impound it and search it with impunity. Surely such a circumstance is not consonant with the fourth amendment.

Id. (emphasis added). The court adopts this reasoning, which appears consistent with that of the Tenth Circuit, requiring the government to show that "reasonable necessity prompted the impoundment." *See, e.g., United States v. Pappas*, 735 F.2d 1232, 1234 (10th Cir. 1984) (inventory search of a vehicle unlawful where the police had no reasonable need to impound the vehicle).

The government argues that impoundment was statutorily authorized for three reasons: (1) a licensed driver was unavailable to drive Ibarra's vehicle; (2) Ibarra did not have liability insurance; (3) the car was threatening public safety because it was parked along the interstate on a curve. As previously noted, an inventory search is reasonable only where the initial taking of custody of the vehicle has been considered lawful, such as where it is authorized by statute. At the hearing in this matter, Officer Mahaffey testified that he had authority to take custody of Ibarra's vehicle pursuant to the "Wyoming Legislature." Examining the relevant Wyoming statutes, cited to the court by the defendant, the court finds that a police officer may take custody of a vehicle under limited circumstances. The law in effect at the time of this incident provided in relevant part as follows:

> Any police officer may remove or cause to be removed to the nearest garage or other place of safety any vehicle found upon a highway when:
>
> (i) Report has been made that the vehicle has been stolen or taken without consent of its owner;

> (ii) The person in charge of the vehicle is unable to provide for its custody or removal; or
>
> (iii) When the person driving or in control of the vehicle is arrested for an alleged offense for which the officer is charged by law to take the person arrested before a proper judge without unnecessary delay.

Wyo. Stat. § 31-5-508(c) (1984). Under the facts of this case, Mahaffey was authorized under Wyoming law to take lawful custody of the vehicle at issue under four circumstances: (1) where a report had been received by him that the vehicle was stolen or (2) being operated without the owner's permission; (3) Ibarra had been arrested for a serious offense; or (4) Ibarra was unable to provide for the car's custody or removal, which of course requires that there be a need for a lawful custody or lawful removal.

At the hearing, Mahaffey's testimony indicated that he had no report that the 1981 Oldsmobile driven by Ibarra was stolen or being operated without the owner's consent. Instead, the evidence was to the contrary. There was no evidence that Ibarra could have been or was arrested for a serious offense. Although Ibarra could have been arrested for the minor offense of operating a motor vehicle without a license, the evidence showed that he was in fact not arrested. Ibarra was instead allowed by law to post a bond securing his court appearance at a later date. Even assuming he was unable to post a bond, it is doubtful Mahaffey could have seized and impounded his vehicle for this offense. *See Dyke v. Taylor Implement Manufacturing Co.*, 391 U.S. 216 (1968).

The government argues that the vehicle, by being parked along the interstate, was threatening public

safety, requiring that the officers remove the vehicle because Ibarra apparently was unable to do so. Aside from the fact Mahaffey never gave Ibarra an opportunity to arrange for the removal of his vehicle, the court finds the argument unsupported by the facts in the record. Although Mahaffey testified at the hearing that the vehicle was parked along the interstate on a curve, where it purportedly could have caused an accident, the court finds this testimony undercut by the fact Mahaffey detained Ibarra at the same location while he performed a routine traffic check and later a search of Ibarra's vehicle. Ibarra was stopped at approximately 3:00 p.m. and the wrecker arrived approximately 45 minutes later. Evidently the vehicle was parked approximately two and one-half feet off the side of the road. Notwithstanding Mahaffey's concern that the vehicle might cause an accident, no evidence was offered that Mahaffey made an attempt to move the vehicle from the shoulder of the highway. No evidence was offered that this could not have been done. Assuming Ibarra could not arrange for the removal of his own vehicle, the court finds that a less intrusive move of the vehicle was a reasonable alternative to impoundment. If safety was the real concern, the vehicle was capable of mobility and a slight move to the right could have placed it in a safer location where it could have been left parked with its doors locked and with Ibarra keeping the keys. In the final analysis, however, and in obvious contrast to *Opperman*, the defendant here was capable of making other arrangements to safeguard his property. If a need in fact existed for Ibarra to move the vehicle, he was plainly capable of making those arrangements with a private towing "service of his choice to a destination of his choice and he was

present and physically capable of making the arrangements for the safekeeping of his belongings." *State v. Travitz*, 140 Ga.App. 351, 231 S.E.2d 127, 128 (1976) (impoundment unnecessary where the driver is present and capable of arranging for the care of an immobilized vehicle).

The statute upon which the government relies does not permit the police to seize a vehicle when the driver is without a driver's license. The government, however, asserts that the statute must be read "to fit the reality of the situation." Here, Ibarra was from another state and was driving with a suspended driver's license in Wyoming. Further, he had no liability insurance. Thus, according to the Government, if Ibarra had been allowed to make his own arrangements regarding the disposition of his car, he probably would have driven it away before renewing his license and obtaining liability insurance. The Government's argument, is speculative and ignores Ibarra's clear right to control the disposition of his property. He did not lose that right simply because his license was under suspension. In Wyoming, having a valid driver's license is not a prerequisite to owning a motor vehicle. The same is true for liability insurance. Further, the insurance problem was irrelevant to Mahaffey's decision to seize the vehicle because he discovered it after he had called the wrecker and separated Ibarra from his vehicle. The court concludes that the impoundment was not prompted by reasonable necessity and was clearly unlawful. Therefore, any inventory search conducted pursuant thereto was unreasonable and in violation of the fourth amendment.

Even assuming, however, the impoundment was proper the court finds that the contraband would not

necessarily have been discovered pursuant to an inventory search. Unlawfully seized evidence is admissible where it inevitably would have been discovered in the same condition by an independent, lawful police investigation. *Nix*, 467 U.S. 431 (1984); *United States v. Owens*, 782 F.2d 146, 152 (10th Cir. 1986). In *Nix* the defendant led police to the body of a ten year old girl whom the defendant had murdered. The court held that the evidence of the body and its condition was admissible even though the police found the evidence by unconstitutionally eliciting admissions from the defendant. The body would have been discovered without the defendant's admissions because an active police search was quickly approaching the location of the body and therefore the evidence would have been discovered in any event. The court recognized that the inevitable discovery doctrine created a needed exception to the exclusionary rule because the doctrine ensured that "the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position that they would have been in if no police error or misconduct had occurred." *Nix*, 467 U.S. at 443 (emphasis in original).

The Government now argues that the unlawfully seized evidence is admissible because Mahaffey would have discovered it lawfully when he conducted an inventory search of the impounded vehicle. Although under *Opperman* it would have been proper to conduct an inventory search of Ibarra's vehicle incident to a *lawful* impoundment, it does not follow that an inventory search was inevitable. To prevail on its inevitable discovery argument, the government must show not only that the officer's inventory search of

the vehicle would have led to the discovery of the cocaine, but also, and even more important to fourth amendment analysis, "that it was inevitable that such a search would be conducted." *United States v. Gorski*, 852 F.2d 692, 696 (2d Cir. 1988). *See also Hellman*, 556 F.2d at 444 (inventory search unlawful where it was not the routine practice of the searching officer). In *Gorski* the defendant was convicted of a drug offense. After FBI agents arrested and handcuffed the defendant, they illegally searched his bag and found the contraband that led to his convinction. In responding to the Government's argument that the evidence was admissible under the inevitable discovery rule in that an inventory search would have been performed during the defandant's booking, the court noted that "[a] thorough review of the record reveals no evidence that such searches were an invariable, routine procedure in the booking and detention of a suspect at the particular FBI office involved." *Id.* The Second Circuit remanded the case to the district court for an evidentiary hearing on this factual issue.

At the evidentiary hearing held in this case, Mahaffey testified at great length concerning when he conducts an inventory search and the extent of his searches. He testified that he generally impounds and inventories a vehicle whenever the driver is arrested or the car has become disabled by ah accident. Neither condition occurred here. In describing the depth of his inventory searches, Mahaffey testified that he generally looks into almost every conceivable place where valuables can be hidden. This includes looking under the engine hood and even into the air filter. He also looks into the spare tire well because one time approximately three years ago he found a box in a spare tire well containing $7,000 worth of jewelry. When ques-

tioned about specific instances of impoundment, Officer Mahaffey testified about many occasions in which he had impounded vehicles but failed to conduct an inventory. For example, in January 1988, Mahaffey took into custody a Raleigh Sheer, Jr. Sheer's vehicle was towed and impounded. He stated, however, that he did not recall inventorying that vehicle.

In April 1988 Mahaffey was involved in the arrest of a Kenneth Elsten. Evidently Elsten had been in a vehicular accident on I-80 at the time of his arrest by Sgt. Dennis Wilson. Mahaffey, who was on the scene, had the vehicle towed and impounded at a private wrecking service. Mahaffey, however, did not inventory the vehicle.

In April 1988 Mahaffey took into custody an Irving Couch. Although Couch's car was towed and impounded, Mahaffey did not inventory the vehicle. He explained that the vehicle was a hatchback and that he did not need to inventory it because he could see there was nothing to inventory. Evidently the glove box was open. Although there was no evidence concerning whether the engine hood was open, Mahaffey apparently did not look under it or into the air filter. Nor did he check the spare tire area.

In October 1988 Mahaffey arrested a David Farrington who was evidently AWOL from the United States Navy. Farrington's car was towed to Warren Air Force Base in Cheyenne, Wyoming, where it was turned over to military police. Thus, Mahaffey evidently did not have to inventory Farrington's vehicle.

On December 1, 1988, Mahaffey arrested a Ronald Jensen. Jensen's vehicle was towed and impounded. Mahaffey, did not inventory it because it had been severely damaged in an accident, making it difficult for him to gain access to the car's passenger compartment without great expense to the vehicle's owner. Mahaffey did not state whether he conducted an inventory search of the engine compartment to look into the car's air filter.

On February 27, 1989, Mahaffey stopped a vehicle on I-80 for speeding. After being informed by the dispatcher that the vehicle was wanted in connection with a runaway girl from California, a Latanya Ayres, Mahaffey arrested the driver. Both the vehicle and its occupants were turned over to the Laramie County Sheriff's Department. Mahaffey again did not inventory the vehicle, presumably because he turned it over to the sheriff's department.

On May 4, 1989, Mahaffey was dispatched to the Lone Tree service station in Albany County because of a report he received of a vehicle fire. Upon arriving, he observed that the vehicle in fact had been on fire and that its contents were scorched. The car was impounded near the scene. Mahaffey stated he did inventory this vehicle. This is the only specific incident involving an impoundment and inventory described by the officer.

Also in May 1988 Mahaffey arrested Donald Jones for driving while intoxicated. The vehicle was towed and impounded but Mahaffey did not inventory it because it was obvious to him there was nothing to inventory. Evidently, the trunk was open as well as the glove box and the spare tire was on the ground. Although Mahaffey testified that his inventory searches are generally very detailed, he evidently was unconcerned about conducting this type of an inventory search on this occasion. The air filter, which was evidently intact, was not searched.

Finally, on May 10, 1989, he stopped a person by the name of Singlethy, who had been traveling on

I-80. Evidently Mahaffey stopped him because an NCIC check revealed that the car's license plate was stolen from Sacramento, California. No evidence was offered on whether the plate was in fact stolen. Apparently it was not because Singlethy was not arrested. Singlety did not have a driver's license but his passenger did. Thus, Mahaffey did not seize the vehicle.

Although it may be the policy of the Wyoming Highway Patrol to inventory vehicles it impounds, it is clear from the evidence that it is not necessarily the routine practice of Officer Mahaffey. The court finds that the Government has not met its burden of showing that it was inevitable that Mahaffey would have conducted an inventory search of Ibarra's vehicle. Instead, the evidence indicated that such searches were not an invariable routine procedure of this officer. As the Ninth Circuit noted in *Hellman*, inventory searches are reasonable only when it is shown to be the routine practice of both the particular police department as well as the individual officer involved in the search. 556 F.2d at 444. Adhering to the "practice gives some assurance that a particular car was not singled out for special searching attention. Absent such assurance some special reason for the taking of safeguarding or security precautions that are not customarily taken should exist if the intrusion resulting from the taking of such precautions is to be rendered reasonable under the fourth amendment." *Id.*

Finally, even assuming that the inventory search was inevitable, which the court finds it was not, the Government still must show that it was motivated by "non-investigatory purposes." *Hellman*, 556 F.2d 443-44. Although Mahaffey testified he intended to

impound Ibarra's vehicle, he later stated under questioning from the court that he thought he was searching the vehicle pursuant to a continuing consent. His testimony is consistent with Officer Leazenby's report, which states that the intent of the officers was to take custody of the vehicle so that they could search it in a more secure location. Particularly, Leazenby was interested in searching the spare tire area because he had notice some plastic bags under the spare tire. In its supplemental memorandum filed with this court, the Government states that Mahaffey had removed Ibarra's suitcases from the trunk of the car "in order to facilitate their inventory." Mahaffey continued his search of the trunk principally near the spare tire where Leazenby had noticed the plastic bags. While Leazenby began a search of the suitcases for firearms, large sums of money and controlled substances, that is, for possible instrumentalities of crime, fruits of a crime and, of course, contraband. Thus, both the investigatory search as well as the inventory search overlapped each other. The court is compelled to conclude that the inventory search, assuming it was inevitable, was tainted by an investigatory motive making it unreasonable under the fourth amendment. In light of the court's decision, it need not address the issue whethe Ibarra freely and voluntarily consented to the first search.

The defendant also has moved to suppress a statement he made to agents of the Wyoming Division of Criminal Investigation soon after his arrest. Although he made the statement after he was given his *Miranda* warnings, the defendant asserts it must be suppressed because the statement was "fruit of the poisonous tree." The court agrees. Evidence generally is fruit of the poisonous tree whenever it is obtained as a result of prior police misconduct. *Wong*

Sun v. United States, 371 U.S. 471 (1963). It is well-established that the "[e]xclusionary rule applies not only to the illegally obtained evidence itself, but also to other incriminating evidence derived from the primary evidence." *Nix*, 467 U.S. at 441. However, the question that must be asked in determining whether evidence is fruit of the poisonous tree is " whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" *Wong Sun*, 371 U.S. at 488 (quoting Maguire, *Evidence of Guilt* at 221 (1959). The defendant made this statement soon after he was arrested and taken into custody. He would not have been arrested but for the prior police misconduct and clearly no intervening, attenuating event occurred to dissipate the taint.

The defendant has asked the court to quash the Indictment against him evidently because the evidence leading to the Indictment was illegally obtained. It would appear that the defendant's remedy would be to ask the court that it release him on bail from pretrial detention. Now, in accordance with this opinion,

IT IS HEREBY ORDERED that the defendant's motion to suppress all evidence seized during the search and as a result of the search, including all statements obtained from him after his arrest, be, and the same hereby is, GRANTED.

Dated this 15th day of November, 1989.

By the Court:

/s/ Alan B. Robinson
ALAN B. ROBINSON
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 90-8018

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

ALEJANDRO GARCIA IBARRA, DEFENDANT-APPELLEE

ORDER

Filed February 12, 1991

Before HOLLOWAY, Chief Judge, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, Circuit Judges, and KANE, District Judge.*

Appellant's petition for rehearing is denied by the panel of judges who rendered the decision sought to be reheard.

Pursuant to Fed. R. App. P. 35(b), the suggestion for rehearing en banc was transmitted to the mem-

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* The Honorable John L. Kane, Jr., Senior United States District Judge for the District of Colorado, sitting by designation.

bers of the panel and the judges of the court in regular active service. No judge having called for a poll, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER
Clerk

By: /s/ Patrick Fisher
PATRICK FISHER
Chief Deputy Clerk

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